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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable James Donato, Judge

IN RE GOOGLE PLAY STORE)
ANTITRUST LITIGATION) NO. 21-md-02981 JD
)

San Francisco, California
Thursday, August 4, 2022

TRANSCRIPT OF PROCEEDINGS

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1 Thursday - August 4, 2022

10:11 a.m.

2 P R O C E E D I N G S3 ---oo---4 **THE CLERK:** Calling Civil 20-5761 and Civil
5 Multi-District Litigation 21-2981, In Re: Google Play Consumer
6 Antitrust Litigation.

7 Counsel, please state your appearances for the record.

8 **MS. GIULIANELLI:** Good morning, Your Honor, it's Karma
9 Giulianelli from Bartlit Beck on behalf of the consumers. And
10 with me, I have Hae Sung Nam from Kaplan Fox; Lee Mason of my
11 firm, Bartlit Beck; Elizabeth Pritzker from Pritzker Levine and
12 Nanci Nishimura from Cotchett.13 **THE COURT:** Okay. Okay. Yes, please.14 **MR. POMERANTZ:** Good morning, Your Honor, Glenn
15 Pomerantz from Munger Tolles Olson.16 At counsel table with me from my firm is Justin Raphael,
17 who will be arguing the class certification motion, and
18 Kuruvilla Olasa, who will be taking Google's position on the
19 motion for preliminary approval. And I'm with the developer
20 class.21 **THE COURT:** All right. Okay.22 **MR. POMERANTZ:** Mr. Rocca can introduce himself and
23 his staff.24 **MR. ROCCA:** Hello, Your Honor, Brian Rocca from Morgan
25 Lewis; Sujal Shah from Morgan Lewis and Minna Naranjo.

1 **THE COURT:** Okay. We will do the developer thing
2 second. So, Ms. Giulianelli, why should a class be certified?

3 **MS. GIULIANELLI:** For many reasons that we would like
4 to address, Your Honor.

5 Before I start, may I hand up -- because I like these and
6 I think that they are helpful -- a book of demonstratives which
7 include excerpts from the expert proceeding transcripts and
8 some questions -- answers to the questions that Your Honor
9 specifically --

10 **THE COURT:** Sure.

11 **MS. GIULIANELLI:** -- asked at the end.

12 **THE COURT:** Okay.

13 **MS. GIULIANELLI:** And we would like to specifically
14 address the questions that Your Honor asked about at the last
15 hearing.

16 **THE COURT:** Okay.

17 **MS. GIULIANELLI:** And they appear on slide 2.

18 Now, I would like to say that to the extent that
19 Your Honor has questions about the key *Daubert* issues regarding
20 antitrust injury -- and we intend to get to those pretty
21 quickly -- including whether the logit pass-on model is
22 generally reliable and can be used here.

23 My colleague, Lee Mason, would be prepared -- and I think
24 welcome the opportunity -- to speak to those. I'm ready to
25 speak to those as well, but I think Mr. Mason would be great.

1 **THE COURT:** Okay.

2 **MS. GIULIANELLI:** Before we get to the first question,
3 however, of antitrust injury, I have one point. I don't think
4 that there could be any reasonable dispute that most of the
5 issues in this case including Google's anticompetitive conduct
6 and the elements of the claim will be resolved through common
7 evidence.

8 We can't lose site of that, of course, because as the
9 Ninth Circuit, the Supreme Court have made clear, even if one
10 common question predominates, a class, the 23(b)(3) should be
11 certified.

12 Now, the first question that Your Honor had was how to
13 determine antitrust injury. Common issues will predominate
14 there as well.

15 As this Court I think in *Capacitors* --

16 **THE COURT:** It's not really common issues. It is
17 common evidence. That's what I'm most interested in.

18 **MS. GIULIANELLI:** Yes.

19 **THE COURT:** Everybody's issues are common. Whether
20 they are going to be proved up in one fell swoop with common
21 evidence, that's the question.

22 **MS. GIULIANELLI:** And we have common evidence that can
23 establish antitrust injury on a classwide basis, and that is
24 Dr. Singer's model. He has provided a common methodology for
25 determining antitrust injury across the class and also for

1 calculating damages with a common methodology and regardless of
2 the application purchased.

3 Now, recall, Your Honor -- and I don't want to spend much
4 time on this unless Your Honor would like to hear it -- that
5 starting with the developer side of the platform, we have a
6 common list price that was derived from generally accepted
7 literature on two-sided markets.

8 That's the Rochet-Tirole model. And in the aftermarket,
9 that is the Landes-Posner model using real-world data from this
10 case.

11 **THE COURT:** Just -- now, the real-world data is what?

12 **MS. GIULIANELLI:** The real-world data comes from
13 Google's transactional database; Google's actual pricing -- you
14 know, the actual take rates; the developer's -- all of the
15 developer's pricing in the world.

16 And slides 6 and 7 just here show the inputs to those
17 models and Dr. Burtis' admission that the models are generally
18 accepted.

19 At slides 8 and 11 -- I'm prepared to argue this. I'm not
20 sure if Your Honor is the most interested in this based on your
21 questions, but slides 8 and 11 show why the use of market-wide
22 data in those models is entirely appropriate in this case.

23 **THE COURT:** Well, let me ask you this: There is no
24 dispute that the consumers were buying apps directly from
25 Google; right?

1 **MS. GIULIANELLI:** Correct.

2 **THE COURT:** Okay. So just let's forget about the
3 econometric models. What is just the raw material from Google
4 that is being used to say 30 percent was the average alleged
5 overcharge?

6 **MS. GIULIANELLI:** So from Google -- Google charges the
7 developers generally -- with some very specific exceptions that
8 it's implemented sort of recently, 15 percent for some
9 categories of developers -- 30 percent. And we know the actual
10 amount that Google is charging each developer based on the
11 transaction database.

12 **THE COURT:** You know that because why? What's in it?
13 Is it a letter? Is it a contract?

14 **MS. GIULIANELLI:** It is a program. So Google
15 basically has programs for the -- you know, the common headline
16 take rate is 30 percent, and that generally applies to all of
17 the developers.

18 Now, recently Google has changed for certain categories of
19 developers, for instance, subscription developers in their
20 second year.

21 **THE COURT:** I'm fine with all that. Let's just focus
22 on the basics.

23 **MS. GIULIANELLI:** Yes.

24 **THE COURT:** You can have some variation. That's not
25 fatal to a class.

1 **MS. GIULIANELLI:** So we know what Google charges
2 developers.

3 **THE COURT:** Let me just make sure I understand. If
4 there is an app that I, as a consumer, want to buy and it's --
5 it always ends in 99; right? So it is 4.99. I go into the
6 store. I buy it. I gave Google \$4.99. Google gets that
7 money. And then Google takes 30 percent out of it and gives
8 the rest to the developers.

9 **MS. GIULIANELLI:** That's basically the way it works,
10 yes, Your Honor.

11 **THE COURT:** Google, you have any problem with that?

12 **MR. RAPHAEL:** Your Honor, I think at a high level for
13 purposes of today that's correct. The actual passing through
14 of the funds is a bit more complicated than that, but I think
15 the direction Your Honor is going in, I think that's probably
16 fine at the level of the principle.

17 **THE COURT:** Okay. So why is that enough to certify?
18 I mean, what more do I need to do? Whether I'm right or not,
19 who knows. We are just looking at: Is there common evidence
20 to show that the class as a whole was overcharged? And what
21 more do I need than that?

22 **MS. GIULIANELLI:** I don't think Your Honor needs a
23 whole lot more than that because we have a model showing that
24 there is common evidence to determine what the but-for world
25 take rate would be; in other words, how it would fall if Google

1 faced competition. And we can do that on a market-wide basis.

2 And Dr. Singer explained how he has a common headline
3 but-for world take rate in using the Rochet-Tirole model.

4 **THE COURT:** Isn't there kind of a natural experiment
5 also because hasn't Google been consistently cutting the rate
6 to 15 percent?

7 **MS. GIULIANELLI:** I don't think that Google has been
8 consistently cutting the rate to 15 percent, but Google has
9 given -- for certain categories of developers; that is,
10 subscription developers in the second year and developers
11 making under a million dollars a year for the first million --
12 a 15 percent discount generally.

13 And so Google has cut it for categories of developers, and
14 we see that and we know what it has cut it for. So they have
15 done that recently.

16 I don't think that that's -- so we know what those take
17 rates are. I don't think that that's a natural experiment in
18 the sense that Google's anticompetitive conduct continues in
19 today's world. So that is not the but-for take rate.

20 **THE COURT:** I thought Dr. Singer's but-for charge was
21 15 percent.

22 **MS. GIULIANELLI:** On a blended overall basis, it is
23 around 15 percent. When -- and what I mean by that is if you
24 are looking at the primary market, the application distribution
25 market and the aftermarket, which is the -- the distribution of

1 in-app products, both of those come out to about 15 percent.

2 But there are two separate market with two separate
3 models, and I don't think there is any -- much dispute that the
4 models are generally accepted for determining the but-for world
5 take rate in those relevant markets, which for purposes of
6 class certification at least Google is not disputing the
7 relevant markets.

8 Now, we understand at the merits they might. But on a
9 blended basis, it is about 15 percent overall for all of them.
10 The common headline take rate --

11 **THE COURT:** How are you going to get to that but-for
12 15 percent on the basis of common evidence?

13 **MS. GIULIANELLI:** We are going to get to that using
14 two models; the Rochet-Tirole model, which is the foundational
15 sort of two-sided market model, and that's what Dr. Singer
16 explained. And that model models what happens when there is
17 competition basically.

18 Another app store comes in and then Google would drop its
19 prices using all of the real-world inputs that Your Honor sees
20 on slide 6, I think, is -- and Dr. Singer went through that at
21 the expert proceeding.

22 So that's one of the models to model the but-for world
23 headline take rate.

24 **THE COURT:** Well, just tell me what is the input from
25 the model from the evidence.

1 **MS. GIULIANELLI:** If you will turn to slide 6, we have
2 a bunch of different inputs to the model. So, for instance, we
3 have -- the inputs are from Google's -- the transactional
4 database. So we have consumer expenditures, basically the
5 values. We have the Google revenues. We have the actual paid
6 transactions. We have, you know, the different -- Google's
7 marginal costs from the documents.

8 And then -- and I think this is one thing that we are --
9 you know, basically, you know, the app -- the average
10 market-wide app distribution -- I mean, the application product
11 pricing, so that's all real-world data. And those are the
12 inputs to the models.

13 **THE COURT:** Okay, so the pass-through rate is the
14 logit formula; right?

15 **MS. GIULIANELLI:** Correct. And I think we should
16 probably, if Your Honor wants, get there because that is, I
17 think, disputed -- well, I know it is disputed. That is one of
18 the main disputes actually -- and we have here -- so that's --
19 so you determine the but-for world take rate using the
20 Rochet-Tirole model.

21 Now, before we get to the pat -- and one of the inputs to
22 that, if you are looking at the take rate for the developers is
23 the pass-through rate; and that's the logit model which we
24 would like to address.

25 **THE COURT:** Right. Let me just jump in. So in order

1 for the Rochet-Tirole model to accurately and reliably forecast
2 a but-for charge, okay, that Google would charge developers,
3 the logit base pass-through rate is an essential variable?

4 **MS. GIULIANELLI:** That is correct for one of the
5 models, yes. And that is when you are accurately forecasting,
6 as Your Honor said, the but-for rate that Google would charge
7 to developers. Now, it bears noting before we --

8 **THE COURT:** Is there no other -- I mean, isn't there
9 some documentary evidence?

10 Is there anybody at Google who wrote an e-mail saying, you
11 know, "all things being equal in a different world, we would
12 have charged only 15 percent?"

13 Is there anything that verifies other than this logit
14 model?

15 **MS. GIULIANELLI:** Is there anything that verifies what
16 Google would have charged or developers would have charged?

17 **THE COURT:** Google would have charged. We are just
18 talking about the but-for Google rate.

19 **MS. GIULIANELLI:** Yeah, I mean, I think we have a lot
20 of evidence in the record of -- from Google of what Google
21 would have charged had there been more competition including in
22 some very specific areas where Google has faced a little bit
23 more competition like it has the Living Room Accelerator
24 Program where there are certain kinds of developers, streaming
25 developers; and Google has been forced to drop its rate there.

1 Google also has a lot of business model planning
2 documents, for sure, where it has talked about -- and, in fact,
3 it has -- started to drop, you will see, a couple of these
4 programmatic drops to 15 percent, the take rate.

5 So we could amass and we have amassed in the depositions
6 and I think in the expert reports they go through plenty of
7 Google documents indicating that the take rate is too high and
8 that Google is looking at dropping, you know, the take rate.

9 But-for purposes of class certification what we have done
10 is -- and, by the way there are -- you know, so there is a lot
11 of evidence there, and we have benchmarks and evidence from,
12 you know, others that is confirmatory of Dr. Singer's --

13 **THE COURT:** What kind of benchmarks?

14 **MS. GIULIANELLI:** Well, bench -- well, for example,
15 like I think we have -- they are in Dr. Singer's report, but we
16 have a table of other platforms like the Epic Store recently or
17 the Microsoft Store in Dr. Singer's report, which I can pull up
18 for Your Honor if you want it, we -- of --

19 **THE COURT:** All right. So --

20 **MS. GIULIANELLI:** -- of these benchmarks, but for
21 purposes of -- and we will get you that exact citation.

22 **THE COURT:** Well, I know you -- I'm sorry. I'm just
23 not going to hang my hat on logit. So I'm asking you to help
24 me out by telling me it is more than just a formula.

25 **MS. GIULIANELLI:** It --

1 **THE COURT:** What I hear you saying is there are
2 benchmarks that Dr. Singer looked at, real-world benchmarks --
3 two of them being Microsoft and Epic -- there are also internal
4 Google documents, planning documents, you know, e-mails,
5 meeting minutes, deposition testimony, indicating that
6 15 percent would have been more or less the landing point had
7 the world been different. So is that all fair?

8 **MS. GIULIANELLI:** I think that is fair. We have
9 Google documents. But I do have a couple -- so yes, that is
10 fair. And I will point you to the table on the benchmarks and
11 Google's own reduction of the rate in certain circumstances
12 where it has faced more competition like IRAP.

13 But going to logit, I think there is one other point
14 there. When Your Honor asked about the pass-on as one of the
15 variables in the Rochet-Tirole model, that is about -- that is
16 a variable when you are calculating basically the take rate,
17 the rate that Google would charge developers.

18 We also have another model briefly, and that is a model
19 where Google gives direct consumer subsidies and that's on
20 slide 4 of the deck.

21 That model does not rely on pass-on as a variable, okay,
22 not logit. But I think that logit -- if we could -- and we
23 will get to that in a minute because I think that this is a
24 very generally accepted, including in antitrust economics and
25 for pass-on methodology -- but before we get to logit because

1 we think -- we have a lot to say about its acceptance here.

2 If you look at slide 4, that's just a depiction of what we
3 call the play points model, and that model models the direct
4 consumer subsidy because remember, Your Honor, Google sits in
5 the middle as a platform and it competes for developers but it
6 also competes for consumers or it would compete for consumers
7 in the but-for world if there were another app store.

8 So what Dr. Singer modeled using the same Rochet-Tirole
9 model but when you are modeling the consumer subsidy, pass-on
10 is not an input to that model. It doesn't rely on logit at
11 all. And that we've called the play points model.

12 In the but-for world, it is kind of like, you know, it
13 increased direct subsidies. Google would offer consumers
14 discounts, more subsidies in the form of rewards, to come to
15 their platform.

16 So Google doesn't really dispute, I don't think, the
17 reliability of the model. It argues that, you know, consumers
18 wouldn't value the points or something else.

19 **THE COURT:** You know, this is Rule 23.

20 **MS. GIULIANELLI:** Yes.

21 **THE COURT:** Okay. So we don't need to go this deep in
22 the weeds. There are just some fairly straightforward
23 questions.

24 Does it make sense for 21 million -- isn't that roughly
25 the class size, 21 million consumers?

1 **MS. GIULIANELLI:** I think we have more transactions,
2 but --

3 **THE COURT:** Tell me, how many people are in the class?

4 **MS. GIULIANELLI:** I think we have something like
5 90 million transactions.

6 **THE COURT:** How many people are in the class?

7 **MS. GIULIANELLI:** The number of people -- I would have
8 to look it up -- but basically it would be everybody that
9 purchased using an -- using an Android -- you know, using the
10 Google Play Store applications on Android.

11 **THE COURT:** Okay. Well, how many people do you
12 estimate that to be?

13 **MS. GIULIANELLI:** I estimate -- I think it is
14 90 million people. There are certainly 90 million and it does
15 make sense -- because we have a common methodology for
16 calculating those damages across the class, so it does make
17 sense to certify a class with that many people.

18 That was one of the questions that Your Honor had at the
19 last hearing. And classes that large are certified all of the
20 time. For example, in the *Apple* throttling --

21 **THE COURT:** Just one second.

22 **MS. GIULIANELLI:** Sure.

23 **THE COURT:** I thought somewhere in your papers you
24 said that the class you are seeking is 21 million people. Is
25 that not right?

1 **MS. GIULIANELLI:** Oh, yes, Your Honor, it is -- so I
2 was answering nationwide because what -- and this goes to the
3 class, 21 million --

4 **THE COURT:** I'm asking a very simple question. You
5 want me to certify a class for you. How many people do you
6 want me to put into your class?

7 **MS. GIULIANELLI:** 21 million -- there are 90 million
8 nationwide; 21 million here because those are the transactions
9 in the 17 states and jurisdictions for which we are moving.

10 **THE COURT:** Why is it 21 million people you are going
11 to be able to prove -- we have already done the 30 percent
12 accused overcharge; okay. Now we are talking about the
13 back-end. Now, we have already gone over this a little bit.

14 So you have some real-world data. You have got some
15 benchmarks. You have a couple other things and you have got
16 this logit formula.

17 Now, let's just talk about logit. Now why is logit okay
18 here for this pass-through rate that is an essential part of
19 that RT formula?

20 **MS. GIULIANELLI:** I am happy to address that and I'm
21 prepared to or Mr. Mason --

22 **THE COURT:** Leave it up to you.

23 **MS. GIULIANELLI:** -- would be fabulous at addressing
24 that, and he is going to explain why it is generally used in
25 antitrust economics including cases like this where they are

1 estimating pass-on.

2 **THE COURT:** All right.

3 **MR. MASON:** Good morning, Your Honor.

4 So on the logit model, I want to start with the general
5 acceptance of the model generally in the field of economics.
6 And so first logit is generally accepted and it is widely used
7 in antitrust cases like this.

8 And the Miller article that Dr. Singer relies upon derives
9 the one minus share formula to measure pass-through, and
10 everyone agrees with those derivations, at least as they state
11 in the Miller article.

12 So first, with the logit model generally Dr. Burtis has
13 admitted that it's used all the time and economic literature
14 confirms that it is standard across a variety of applications.

15 And second, it is used specifically in the field of
16 antitrust economics; and it is regularly used to calculate out
17 changes in cost-effect prices.

18 And the Werden and Froeb article that you have on slide 12
19 of your deck shows that the logit model is commonly used to map
20 a change in merging parties' cost that come down from merger
21 synergies into a change in price.

22 And the merger context is a lot like this case. So the
23 basic idea there is here is; that you will map how firms will
24 change their prices based on cost savings.

25 Savings in Werden come from a merger and in other merger

1 cases that have applied it, but the savings here are also from
2 a consolidation of power just like the overcharges in a merger
3 case.

4 And the reason economists use logit and mergers is that
5 they can't have a backwards looking look at changes and cost
6 because the cost savings haven't happened yet because you are
7 looking at the merger as it is happening.

8 And the same is true here. So Google's take rate has
9 remained constant for the vast majority of transactions,
10 92.4 percent are still at 30 percent.

11 So Dr. Singer's analysis first confirms that the logit
12 model fits the data we have in this case. And that's the logit
13 demand curves, and he talked about this quite a lot at the hot
14 tub that he ran 35 regressions at the demand categories or the
15 app categories to note the consumer demand explained how price
16 changes affected those app shares in the category.

17 So that's confirmatory evidence using real-world data in
18 this case, but the logit model fits and describes how
19 developers are competing based on the price of an app.

20 And then once he has done that, he can use the formulas
21 that are derived in the Miller article to calculate
22 pass-through on the developer-by-developer and app-by-app
23 basis.

24 And I'm happy to go into any more details of the analysis
25 if you like.

1 **THE COURT:** So just on the front end, okay, the
2 30 percent, you are saying that Dr. Singer ran logit to show
3 that -- show what, that the developers were passing through the
4 entire 30 percent?

5 **MR. MASON:** Not quite, Your Honor. So Dr. Singer
6 looked at historical price changes, so the developers' final
7 consumer prices, and used that as the independent variable to
8 see how they affect the dependent variable, the developers'
9 share, within the category.

10 So then based on that he could determine that a logit
11 demand curve, which is just a shape of a demand curve,
12 described the demand developers were facing in this case.

13 And then the next step from that analysis of the actual
14 data in this case, he used the formula which is derived from
15 the logit demand curve, is inherent to the curve that he
16 confirmed applied in this case, to determine if developers were
17 given a reduction in price how they would change their prices
18 in order to maximize profits in accordance with the demand
19 curve that they faced.

20 **THE COURT:** Okay, so that is all common evidence that
21 would be used for everybody on the consumer side.

22 **MR. MASON:** Exactly. It would be able to basically
23 put the output of the Rochet-Tirole model, which gives you the
24 change in take rate, and then the output of the logit model;
25 see the pass-through. And that can be done on a category

1 basis. It can be done on an app-by-app basis all with common
2 evidence formulaically to essentially spit out an overcharge
3 that each consumer in the class would have faced.

4 **THE COURT:** Okay. Let's hear from Google. So you
5 understand the exercise. This is Rule 23. This is not a
6 non-substantive motion; okay.

7 We are looking only at: Does it make sense for everybody
8 on the Plaintiffs' side to travel as a group or do they need to
9 fly individually.

10 And so I'm sure I have tipped my hand to some extent. I'm
11 having trouble seeing why flying as a group is a bad idea so...

12 **MR. RAPHAEL:** Well, Your Honor, I think the issue here
13 is we have a novel class and a novel formula and a novel
14 agreement with the states, which maybe we will get to later;
15 but just focusing on the issues --

16 **THE COURT:** Novelty is not inherently suspect.
17 Novelty is good in many cases.

18 **MR. RAPHAEL:** Understood, Your Honor, but I think in
19 this case the novelty violates fundamental principles of
20 economics that their expert conceded as well as I think the
21 well-established case law from the Ninth Circuit and a number
22 of other cases.

23 And so I think from that exchange with the Court I just
24 want to clear up sort of what fits where because I think that
25 will set up why the logit model here cannot be used to predict

1 with common evidence whether there is antitrust impact, which
2 the Court has said that's what really matters at class
3 certification.

4 So their proposed class, as Your Honor said, has
5 21 million consumers, and those consumers had transactions with
6 300,000 different apps; right. So that's everything from
7 Thomas The Train to the Swimming app --

8 **THE COURT:** I know I said 21 million, but I think one
9 of you pointed out that over 8 million are just purchasers of
10 one app; right?

11 **MR. RAPHAEL:** Precisely, Your Honor, and I think
12 that --

13 **THE COURT:** So it is really in some ways 14 million --
14 I mean, 8 million people -- 8-and-a-half, 9 million, whatever
15 the number was are buying -- who is that, by the way? Nobody
16 ever told me. Who is that one popular app that --

17 **MR. RAPHAEL:** Well, it is not a single app,
18 Your Honor. There is 40 percent of the class, roughly
19 8 million, have had a transaction with any one app. They only
20 had one app associated with their transactions. And I think
21 that matters very much, Your Honor.

22 **THE COURT:** I see. It is not one app. It is one --
23 okay, all right.

24 **MR. RAPHAEL:** And I think that matters very much
25 because if there was no pass-through for the app that was

1 associated with those people's transactions, then that's
2 8 million uninjured people potentially, at least, Your Honor;
3 right.

4 So they need a method to determine even if there was that
5 overcharge at the -- what they call the take rate level, at the
6 service fee level, right, if we -- even if we just assume that
7 for purposes of argument, they need to show how that -- if that
8 was passed through to each of the 20 million consumers -- and
9 the only method they have to do that is Dr. Singer's, what they
10 call the logit model. It is really just that one minus the
11 share formula.

12 That is their only basis -- it is their only supposedly
13 common evidence for doing that.

14 And, Your Honor, that one minus the share formula has
15 never been used in any antitrust case.

16 **THE COURT:** I don't think that's right. I was
17 pressing your colleague about evidence that is outside of the
18 formula, and she says she has internal Google documents,
19 business plans, deposition testimony, maybe some developer
20 testimony. Thirty percent does not seem to be something that's
21 purely the invention of mathematics based on real-world data.

22 **MR. RAPHAEL:** No, Your Honor. I just want to clear
23 something up because I think there was potentially some
24 conversation about what Ms. Giulianelli said.

25 My understanding is that the evidence she was referring

1 to, other than Dr. Singer's formula, related to calculating
2 what the service fee would be in the but-for world, not whether
3 it was passed through.

4 On that point I don't recall any other evidence that was
5 remotely common or, frankly, any other evidence at all in their
6 papers as to what pass-through would be.

7 So I think on pass-through -- I'm sure Ms. Giulianelli
8 will correct me -- but on pass-through it essentially comes
9 down to the one minus the share formula. That's what has been
10 argued through the briefs, and I think that was what was
11 Dr. Singer's position at the hot tub.

12 So if there is other evidence they are contending that
13 shows pass-through common evidence, I think this would be the
14 first that we have heard of it.

15 I think what we are really talking about here is this one
16 minus the share formula. And this formula comes from a single
17 article. It has not been used to do pass-through in any
18 antitrust case.

19 The logit model on which it is based, they have one
20 article that suggests it is done in mergers. And I think,
21 Your Honor, there is two facts here that show that this logit
22 model can't be used here. And I think, frankly, they are
23 undisputed.

24 The first, Your Honor, is that their article -- and I
25 would like to just hand up a few pages of documents where I

think Your Honor can see this quite clearly. Can I do that?

THE COURT: Hand it to Ms. Clark.

MS. GIULIANELLI: May I see?

COURT REPORTER: Can I get your name again?

MR. RAPHAEL: Sure, for the reporter my name is Justin Raphael for Google.

COURT REPORTER: Thank you.

(Pause in the proceedings.)

MR. RAPHAEL: So, Your Honor, there's two facts that I think show clearly that the logit model cannot be used in the circumstances of this case; that there is no economic support for doing that.

(Pause in proceedings.)

THE COURT: Oh, do you have another copy?

MR. RAPHAEL: Yes.

THE COURT: Thank you. Okay, go ahead. All right.

Go ahead.

MR. RAPHAEL: So the first fact, Your Honor, is that the service fee here is a percentage of the price charged.

In the economic literature that is known as an ad valorem cost as opposed to a per unit cost. So a per unit cost would be 30 percent. An ad valorem cost is -- sorry, a per unit cost is 30 cents. An ad valorem cost is 30 percent.

And the second fact -- and I will go through these with what I handed up because I think it's quite clear. The second

1 fact the Court needs to understand is that all of the apps in
2 each category on which this logit formula is based are
3 concededly not substitutes.

4 So if Your Honor will turn to tab 4 in what I have handed
5 up, you will see on page 452, it should be the second page with
6 text -- and we have highlighted it for the Court -- it says
7 that suppose a per unit tax is levied on each product in the
8 model; right.

9 So the only article where this formula comes from, the
10 only one they have ever been able to point to says "a per unit
11 cost."

12 It is undisputed, Your Honor, that we don't have a per
13 unit cost here. And so there is literally no economics article
14 in the record suggesting that this formula can be used in the
15 circumstances of this case where we have an ad valorem cost
16 that's a percentage of the price charged.

17 That has never been done before. There is no economic
18 evidence in the record suggesting that anyone has ever done it
19 or that it could be done. No economist has even suggested that
20 it could be done.

21 **THE COURT:** Okay, that's fine. Why is it wrong?

22 **MR. RAPHAEL:** It is wrong, Your Honor, because I think
23 the data show -- you know, Your Honor talked about data. We
24 have this, to some degree, maybe a natural experiment. We have
25 data suggesting that pass-through was not universal.

1 There was a variation -- in fact, dramatic variation -- in
2 pass-through.

3 **THE COURT:** I don't have a problem with that. In
4 fact, it must have been you. I don't remember. There has been
5 a lot of information in the case.

6 Somebody said something up to 16 percent of developers had
7 different charges from Google and presumably were passing
8 through different amounts to consumers as a result of that.

9 That's fine.

10 You know, the world is not expected to be entirely
11 homogenous. This is the United States District Court. There
12 are going to be some unraveling of the blanket here and there.
13 It doesn't mean that the blanket as a whole; i.e., a class, is
14 a bad idea.

15 So I'm fine with the fact that there is some -- some rough
16 edges and it is not one size fits all. It doesn't have to be
17 to certify a class.

18 **MR. RAPHAEL:** Well, Your Honor, I don't think --

19 **THE COURT:** The -- the recent decision in the *Bumble*
20 *Bee Tuna* case makes that abundantly clear. You can have
21 substantial variations and as long as -- as long as the main
22 dispositive questions are all subject to the same evidence,
23 common methods of proof, you got a class.

24 Now, whether you win or lose on the merits, totally
25 different issue. We all agree on that; okay. You can still

1 have a class and kill the other side on the merits. There is
2 no dispute about that, but the question is: Let's say
3 21 million consumers brought individual suits, are they going
4 to be using a different pool of evidence in each and every one
5 of those cases to prove that Google engaged in an
6 anticompetitive overcharge?

7 Right now I think the evidence overwhelmingly says no.
8 They are all going to be using more or less the same evidence.

9 If that is correct, as I believe it to be, that means
10 Rule 23 has been satisfied.

11 That's what I need to hear from you. Why is that not the
12 case?

13 **MR. RAPHAEL:** Well, Your Honor, I think the -- I'm
14 glad you mentioned the *Olean* decision because I think the *Olean*
15 decision shows exactly why class certification has to be denied
16 here.

17 And I think what the *Olean* decision explains is that it is
18 not merely the expert walking into the court and saying: "I
19 have one model and apply it to everyone."

20 The *Olean* court explained -- and I think this is at
21 footnote 13 of the opinion at page 678 as well in the
22 discussion of the new motor vehicle case -- and the court
23 explained that what the Plaintiffs need is a model that is
24 capable of showing who was injured and who was not; that there
25 can't be so many factors at play that are uncontrolled for;

1 that the Plaintiffs aren't able to show who was injured and who
2 was not.

3 Now, here we have pass-through rates in 2 percent,
4 8 percent. Here, the search is going to be for consumers who
5 were injured rather than who weren't.

6 And the court in *Olean* found that the Plaintiffs had that
7 evidence because they had a regression.

8 And as I think Your Honor is familiar with from past
9 cases, from *Capacitors*.

10 **THE COURT:** *Olean* is a price fixing case. So let's
11 just worry about your monopolization case; okay.

12 I'm still not -- I understand what you are saying. I
13 mean, we all agree on the principles; but you are not telling
14 me why as an evidentiary matter what I said is not right, which
15 is if 21 million people sued, they would still all be using,
16 90 percent or more of the same evidence, to prove Google was
17 guilty.

18 **MR. RAPHAEL:** Your Honor, we --

19 **THE COURT:** I'm not seeing how any of these people
20 would be different. And if that's the case, economy,
21 efficiency, and the administration of justice indicate that
22 Rule 23 makes sense in this context.

23 **MR. RAPHAEL:** Well, Your Honor, each Plaintiff -- with
24 each Plaintiff, we are going to be able to come in and point
25 out all of the factors that will affect the pass-through with

1 respect to -- and Your Honor had talked about the 8 million
2 that had one app. We are going to be able to come in and talk
3 about the factors that affect whether there would be
4 pass-through for that app.

5 One of them is focal point pricing. There's the
6 competitors they face, as Your Honor pointed out last time.
7 There is the cost structure.

8 We can just focus on focal point pricing as an example,
9 right, 97 percent of the prices in the actual world ended in
10 99; right. And Dr. Singer says that is an important
11 consideration here.

12 If the service fee does go down, are they going to change
13 the price from 1.99 to 1.92? We tend not to see prices like
14 that. We didn't see them in the actual world.

15 And in the three cases in this district involving
16 allegations of pass-through, the court said if you don't
17 account for that -- if you don't account for factors like focal
18 point pricing, then the Plaintiffs don't have common evidence
19 that is going to be able to do the trial in one fell swoop
20 because we are going to have to ask for every single
21 intermediary would they set pricing at focal point prices or
22 not.

23 And just -- I mean, we have the *Apple* case, the
24 *Lithium-Ion Battery* case. We have the *Optical Disk Drive* case.

25 Maybe just focus on the *Apple* case because I think it is

1 the most recent, and I think it is probably the closest to the
2 facts of this case.

3 So in the *Apple* case the Plaintiffs had a theory pretty
4 similar to what the Plaintiffs have here that if the service
5 fee in the Apple app store was lower, then the prices of the
6 apps and -- in the Apple app store would be lower as well.

7 And the Plaintiffs' expert there -- there was overwhelming
8 evidence of focal point pricing, just like we have here,
9 97 percent of the prices have focal points. And their expert
10 didn't account for focal point pricing.

11 The model wasn't capable of capturing that factor. And
12 Judge Gonzalez-Rogers said: "That model is discluded. I'm
13 denying class certification because it is not picking up on the
14 factors that will affect pass-through."

15 **THE COURT:** I don't necessarily agree with that. I'm
16 sorry. I just don't think that is necessarily right. I don't
17 think that is a barrier to Rule 23. Maybe fodder for
18 cross-examination, maybe other things for trial. The fact that
19 you can impeach the model does not mean that the class can't be
20 certified.

21 **MR. RAPHAEL:** Well, I think, Your Honor, that what we
22 have here is more than impeaching the model as to whether --
23 again, I compare it to the case with regressions, which is what
24 we usually see. It is what Dr. Singer used --

25 **THE COURT:** You usually see in price fixing cases. In

1 monopolization cases you see all different sorts of things. I
2 know from my experience. Section 2 is just a different
3 analysis.

4 You know, price fixing cases are often off-the-shelf,
5 linear regressions that everybody agrees on and have been
6 carved in stone for decades.

7 Section 2 is more complicated, more sophisticated. It is
8 more dynamic. It is a different proposition. So, I'm not -- I
9 don't think focusing on these Section 1 cases is going to help
10 you here.

11 **MR. RAPHAEL:** Well, Your Honor, I guess -- I do agree,
12 Your Honor, that the pass-through here is more complicated. I
13 think the problem is in a case that is more complicated we have
14 a formula that is vastly more simple, and we have a formula
15 that is being used in circumstances where Dr. Singer conceded
16 that it can't be used.

17 **THE COURT:** I don't think he conceded that.

18 **MR. RAPHAEL:** Could I point Your Honor to the
19 transcript?

20 **THE COURT:** No, that's okay. I was here. Okay.
21 Anything else on common evidence and why that doesn't
22 predominate?

23 (Pause in proceedings.)

24 **MR. RAPHAEL:** Your Honor -- you know, Your Honor, I
25 would just say that I think Dr. Singer's model does not capture

1 the factors that he himself conceded are -- are factors in
2 whether there is going to be pass-through for each individual
3 Plaintiff.

4 Each individual Plaintiff had some collection of apps.
5 All of those apps have different price structures. They have
6 different cost structures. They have different competitors,
7 and the Plaintiffs have absolutely no method to account for any
8 of those factors.

9 The only thing that it depends on -- their whole
10 pass-through theory, the only thing it depends on is these app
11 categories.

12 And I think that that's -- under the *Olean* decision that
13 says they need a model that is capable of accounting for and
14 controlling these factors that will affect the variation. I
15 don't think that that comes close to the *Olean* standard.

16 **THE COURT:** Okay. Plaintiffs, closing thoughts?

17 **MS. GIULIANELLI:** I do have a couple of things,
18 Your Honor, to say. I think Your Honor is right. Dr. Singer
19 never conceded that this logit model was novel.

20 In fact, it is not novel. It is used in mergers and
21 situations like this all of the time, which is very similar to
22 monopolization.

23 And the one -- when Google's Counsel says it is really
24 just the one minus share formula, that is mathematically
25 derived from published, peer-reviewed literature. And there is

1 no dispute that the math is correct, and that it was derived
2 from there.

3 So what we have is a dispute, I think, about whether a per
4 unit cost or an ad valorem cost is the appropriate level of
5 cost.

6 Now, the experts dispute this. I think that that's for
7 the trial and on the merit, but there is nothing in the
8 published literature that says it is limited to a per unit
9 cost.

10 And if you look at the derivation, there is this term "T"
11 and that is not limited to a per unit cost. They mention per
12 unit cost, but the article says it's a general model of
13 pass-through. That's what it says. It says it is a general
14 model of pass-through using the one minus share formula which
15 is derived from some very, very complicated mathematics.

16 We have six formulas and we have it on one of the slides
17 that I'm happy to go through but I have the feeling that this
18 is probably something Your Honor doesn't want to hear at that
19 level.

20 But the point is that there is a common general --

21 **THE COURT:** It is not a matter of -- it is just a
22 matter of whether I need to do this, and I don't think that I
23 do.

24 Let me ask you this -- you should close out that
25 thought -- but 21 million people, that's not inherently a fatal

1 number. It is a lot of people. So I want to get some sense
2 about manageability. There is a point where you can have a
3 class that is too big.

4 Now, I don't know if 21 million is that number or not but
5 I want to hear about that. Why don't you just finish your
6 thought on that logit point and then let's talk about size;
7 okay.

8 **MS. GIULIANELLI:** The only thought on the logit point
9 is that it is a reliable generally -- it is a reliable common
10 methodology that can be applied here, and I think this goes
11 straight to Your Honor's question of manageability.

12 So Your Honor asked how you could calculate -- this is two
13 related questions, question number 2 and I think number 3 in
14 the deck -- how you can calculate independent -- individual
15 damages app-by-app using this model. And Dr. Singer ran
16 through that common methodology for doing. That it is on
17 slide 25 if Your Honor wants to look at it later.

18 Basically, the point is that this can be looking at each
19 individual's damages including those that bought only one
20 application can be done using each member's own purchase
21 history in the class; and it can be done on an app-by-app basis
22 using the common methodology that Dr. Singer has provided here.

23 There are different pass-on rates and there are different
24 damages for each consumer, but they are derived using the same
25 model. It's math. It is coding. And that can be done

1 regardless of the application and the consumer. Same set of
2 facts and --

3 **THE COURT:** Let me just jump in. So let's say it is
4 21 million people in this class that you want me to certify.
5 Is it the case then that Google has all the class period,
6 okay -- whatever it is, five years, whatever -- pardon me --
7 Google has complete purchase records for each individual, which
8 app they bought, when they bought it, how much they bought it
9 for, it's all electronic. This can all be done very quickly
10 with some data analysis program, you know, whatever, a
11 spreadsheet; okay.

12 So for each person you could figure out their total
13 purchases subject to a potential refund for an overcharge,
14 assuming you hit a home run and ring the bell and you get to
15 that point, who knows -- maybe you will; maybe you won't -- you
16 can do all that electronically, and it is rock solid; and it is
17 all just done at the -- literally at the speed of electrons and
18 you don't have to ask anyone to submit claim forms or anything
19 else; right?

20 **MS. GIULIANELLI:** Well, I think that's basically
21 right. On the claim forms that the claims administrative
22 process people would have to come and charge; but if Your Honor
23 can go to slide 26, you are exactly right in that this is an
24 excerpt from Google's transactional database. And you will see
25 here that Google actually has all of this information that

1 Your Honor asked about. Google knows --

2 **THE COURT:** All right. What is this on 26?

3 **MS. GIULIANELLI:** Slide 26 is basically an excerpt
4 from some of the transaction database that Google maintains.

5 **MR. RAPHAEL:** Your Honor, this is -- this appears to
6 be a picture of something from Google's database. I don't know
7 where it came from or what -- I mean, it looks to be a screen
8 capture of something that seems like an internal Google
9 database.

10 **MS. GIULIANELLI:** Right.

11 **MR. RAPHAEL:** That's what Ms. Giulianelli is
12 representing it is. I have not seen this in any of the
13 briefing. It wasn't disclosed --

14 **THE COURT:** I will ask you the same question in just a
15 moment. Let's assume that this is a screenshot of transaction
16 database.

17 **MS. GIULIANELLI:** This is a screenshot of what Google
18 produced to us, to our experts in this case. And it is
19 answering Your Honor's question somewhat about manageability.

20 Now, what we have here is that -- Google's transactional
21 data identifies each customer by its own unique customer ID.
22 You can see the app the customer purchased, the date that it
23 was purchased, the billing address -- so state-by-state -- you
24 can see the amount paid.

25 So Google has all of this information, and they provided

1 it to us.

2 **THE COURT:** So each individual consumer has a unique
3 ID number?

4 **MS. GIULIANELLI:** Correct. Right here in the
5 transactional --

6 **THE COURT:** Just a moment. And that sticks with the
7 consumer for the class period?

8 **MS. GIULIANELLI:** It does.

9 **THE COURT:** So they bought something in 2019 and they
10 took a break and they did the digital detox; took a break;
11 decided that life was colorful enough without it. They went
12 back in 2022, they would still have the same ID.

13 **MS. GIULIANELLI:** I think unless the customer
14 changed -- and Google's Counsel will correct me if I'm wrong --
15 their Gmail address.

16 But when a customer buys something through Google Play
17 billing, which is required by Google in this case, the customer
18 has to sign up with Google. They give their information to
19 Google. They give their credit card. They give their payment
20 information, and they have to have a Gmail address and they
21 have to have a customer ID. And that's what you see here.

22 Now, the customer ID on this, I think, was anonymized by
23 Google before they provided it to us, and I have a bunch of
24 letters that we went back and forth when we were getting the
25 transactional data for personal privacy information; but the

1 point is Google -- these are actual real-world customers from
2 their database.

3 They have an ID and each customer has an ID. So that's
4 associated with a Gmail address. And all the customer needs to
5 know is their Gmail address, and then Google is able to match
6 the information.

7 **THE COURT:** Has to be Gmail? They can't have --

8 **MS. GIULIANELLI:** Well, I think Google requires Gmail.
9 That's my understanding. I could be wrong but I'm pretty sure
10 I am not. Google's Counsel -- so when you sign up for a Google
11 account and you buy through Google Play billing, you have a
12 Google customer ID.

13 **THE COURT:** Is that right, Counsel, you have to have
14 Gmail?

15 **MR. RAPHAEL:** I don't believe that's right,
16 Your Honor. I would say that a lot of what Ms. Giulianelli is
17 bringing up was not in the briefing, so I'm not really sure --

18 **THE COURT:** I'm asking.

19 **MR. RAPHAEL:** What I'm saying, Your Honor, is I don't
20 believe that's correct.

21 **THE COURT:** Okay, well, let's pause for a moment. So
22 look, you understand what I'm asking. I mean, look, it stands
23 to reason -- and Ms. Giulianelli is providing the evidence that
24 supports that proposition that Google knows exactly who bought
25 what when and how much they paid and how to reach them because

1 that's the business.

2 So is there any reason for that -- to call that into
3 question? In other words, this should be super easy to figure
4 out -- even though it is a giant class and it gives me -- I
5 have got to think about that -- but it is not really a hard
6 class to deal with because of all of the electronic
7 information.

8 **MR. RAPHAEL:** Well, just -- I don't agree, Your Honor,
9 but let me just say with respect to all the information,
10 certainly Google has information about what purchases were made
11 and who made them.

12 I don't know specifically whether we have the information
13 with respect to whether -- how the class intends to do this, so
14 I don't want to represent that we do because I don't believe
15 that we have been told precisely how this will work and what
16 fields and so forth. So I just want to make sure this is
17 clear.

18 **THE COURT:** I'm asking a simpler question.

19 **MR. RAPHAEL:** I do think --

20 **THE COURT:** I find it hard to believe that Google, of
21 all companies, doesn't have a highly detailed database of every
22 transaction through the Google store. Now, are you telling me
23 that's not right?

24 **MR. RAPHAEL:** Your Honor, there is extensive
25 transactional data. I'm not suggesting that there isn't.

1 **THE COURT:** Okay.

2 **MR. RAPHAEL:** I do think that -- I don't think that
3 solves the manageability problem, Your Honor, because I think
4 if we think about how is this going to look at a trial, we are
5 going to come in -- we have a due process right to come in and
6 say to each one of these 8 million or 21 million people "you
7 weren't injured because look at the app you bought; look at
8 that developer's marginal cost; look at that developer's
9 competitors; look at that developer's commitment to focal point
10 pricing; look at that developer's commitment to reinvesting
11 savings back into their app;" all of these things that affect
12 whether they are injured.

13 And if we come into the courtroom with that evidence with
14 one person -- let's just focus on one person -- and then what
15 are they going to do? What evidence do they have to address
16 all of those factors that we have? They don't have evidence
17 that will --

18 **THE COURT:** We are talking about something else right
19 now. If we need to get -- if we get to the point -- and who
20 knows, as I have said repeatedly, whether you will or not -- if
21 we get to the point where we have to communicate with the class
22 and let them know that this is the amount of money they are
23 entitled to get and they are bound by the judgment and here is
24 how you get your check, I mean, all of that sounds pretty easy
25 because there is a giant database which can be electronically

1 manipulated in relatively common and simple ways. Is there any
2 reason that you disagree with that?

3 **MR. RAPHAEL:** Your Honor, I certainly agree there is a
4 lot of data, and I would suspect that there might be ways we
5 could figure out how -- what purchase -- you know, who bought
6 what and when; but I can't represent it can be done in a
7 particular way because I haven't heard exactly how they are
8 trying to do it.

9 **THE COURT:** I understand.

10 **MR. RAPHAEL:** I'm not denying there is a lot of data
11 and that there's people --

12 **THE COURT:** I'm not asking you to be the settlement
13 administrator. I'm just asking you to tell me whether you
14 anticipate any and I'm hearing the answer is no.

15 Okay, I mean, that goes a long way to making me feel a lot
16 better about 21 million people, which is still large. It is
17 really just a manageability issue.

18 **MR. RAPHAEL:** Your Honor, can I just point out one
19 more thing on that?

20 **THE COURT:** Sure.

21 **MR. RAPHAEL:** I mean, I do think we have this issue of
22 who is in what state and the residency of people in one state.
23 They point out billing addresses. I don't know whether those
24 would precisely map on when you are talking about individuals
25 that can change their addresses and --

1 **THE COURT:** Well, that is a solvable problem. I'm not
2 too worried about that. Let me -- I just don't understand what
3 you are doing with the State Attorney Generals. You have
4 carved up the country. Now, what does that mean for damages?

5 **MS. GIULIANELLI:** Let me address that exactly. That
6 was the fourth question that Your Honor had.

7 So I would like to spend just a brief minute on the
8 background of the agreement and how it came to be and then
9 answer how we are going to do the damages.

10 Your Honor, might remember that the consumer class filed
11 this lawsuit with the class representatives almost a year --
12 and then almost a year later the states brought the same claims
13 in 39 jurisdictions for the same damages claims, for the same
14 consumers under federal law.

15 And so for the efficiency of this litigation, what we were
16 looking at was two sets of people, the State AGs in their
17 parents capacity and the class, who had been working on this
18 for nearly a year representing the same consumers and the same
19 jurisdictions.

20 So for the efficiency of the litigation we entered into an
21 agreement that we would jointly prosecute the claims against
22 Google. And, you know -- and so, you know, you have the joint
23 prosecution agreement in there.

24 One of the important terms of the agreement is the states
25 are going to pursue damages claims, just as we are, and will

1 distribute the net proceeds to the consumers who were injured,
2 just as we will.

3 And so what we have done pursuant to this agreement, for
4 the efficiency of the litigation, was agree that we would move
5 for class certification in the 17 jurisdictions that are not
6 covered by the State AGs claims because there is no need for
7 double recovery here.

8 We are not looking for double recovery. So as long as the
9 states, which they are, are pursuing damages claims, the same
10 damages under federal antitrust law, for their consumers in
11 those jurisdictions, we are pursuing the claims for the
12 consumers in the 17 jurisdictions for which we have now moved
13 to certify a class.

14 So we are working together to do that but our -- and
15 that's where which got the confusion between the 90 million and
16 the 21 million -- because nationwide it is 90 million, but we
17 are seeking to certify basically 21 --

18 **THE COURT:** It is 90 million with every Plaintiff
19 group.

20 **MS. GIULIANELLI:** Correct, correct.

21 **THE COURT:** Okay.

22 **MS. GIULIANELLI:** And so that's -- and really how that
23 operates is we will hopefully have a certification for the 17
24 states which are not covered by the State AGs parents claims
25 which are the same -- you know, same claims.

1 So we are all basically rowing in exactly the same
2 direction here pursuing same anticompetitive conduct, same
3 everything across the nation that Google has entered into; but
4 we are working hand-in-hand with the State AGs because they are
5 willing and ready and able and have brought claims for the
6 consumers in their states to recover the damages.

7 And I'm -- we have had all of these filings, Your Honor,
8 in the last day that Google brings up about the class
9 representatives. And I'm happy to address those or Your Honor
10 can read the filings if Your Honor wants.

11 **THE COURT:** I think I'm okay on that.

12 **MS. GIULIANELLI:** Okay.

13 **THE COURT:** So, okay. Thank you. I will take this
14 under submission.

15 **MR. RAPHAEL:** Can I be heard on that, Your Honor?

16 **THE COURT:** Sure. Any closing thoughts?

17 **MR. RAPHAEL:** I just think that class counsel left
18 something out, which is that they are -- their agreement
19 provides that they will be able to get fees from the Attorney
20 General action where there are consumers who they will not
21 represent even if the class is certified. And I think --

22 **THE COURT:** Well, who knows.

23 **MR. RAPHAEL:** -- that creates some issues that we
24 raised in --

25 **THE COURT:** That's for another day. I'm not awarding

1 fees to anybody at all. Whether that day comes to pass, who
2 knows. I can guarantee to Google it is not going to be a
3 situation where somebody gets something for nothing. That is
4 just not going to happen, okay, so don't worry about that.

5 I don't -- I don't think that's a counsel versus putative
6 class member conflict. Anyway, I'm not worried about that.

7 Just so -- okay. While you are -- is everybody here?
8 Maybe everybody is not here. Everybody is not here. I was
9 going to ask, people are asking for more time now and all sorts
10 of things, but that's fine. It's okay.

11 **MR. GLACKIN:** Your Honor, everybody is here.

12 **THE COURT:** Everybody is here; okay? Well, would you
13 rather just come back in a couple weeks for a status
14 conference? How about that?

15 **MS. GIULIANELLI:** I think -- well, since we all have
16 filed this, I think the issue is that currently the expert
17 reports are due on August 15th. And so if there is going to be
18 even a month extension of time, we would need to know that now.
19 That's the only issue I see about the status conference.

20 **THE COURT:** Well, should we just -- why don't you come
21 on up and make your appearances.

22 **MR. GLACKIN:** Brendan Glackin, Special Assistant
23 Attorney General for the State of Utah representing the States.

24 **THE COURT:** All the States?

25 **MR. GLACKIN:** Correct.

1 **THE COURT:** Okay.

2 **MR. REITER:** Good morning, Your Honor, Joseph Reiter
3 on behalf of the Match Plaintiffs.

4 **MS. MOSKOWITZ:** Good morning, Your Honor, Lauren
5 Moskowitz for Epic Games.

6 **THE COURT:** Oh, okay. All right. Okay. So what
7 is -- what is Google's perspective on more time?

8 **MR. POMERANTZ:** We are actually --

9 **COURT REPORTER:** Your name, please.

10 **MR. POMERANTZ:** My name is Glenn Pomerantz. I
11 previously introduced myself. We are happy with any one of
12 three results.

13 **THE COURT:** Three, okay.

14 **MR. RAPHAEL:** We can keep the current schedule. We
15 can move the entire schedule by a month or we can move -- as
16 the States are requesting or we can move the entire schedule by
17 three months as one of Match's request.

18 What we want, Your Honor, is a single trial with all of
19 the Plaintiffs.

20 **THE COURT:** I agree. That's what I want too.

21 **MR. POMERANTZ:** We want that. The other two things
22 that we would like --

23 **THE COURT:** Mr. Pomerantz, you mean move the trial --
24 move everything by --

25 **MR. POMERANTZ:** Everything moves by a month or

1 everything moves by three months. Those are alternative
2 requests from various people on this side. We are okay with
3 either one. We just need three things. One trial with
4 everybody.

5 **THE COURT:** Before I do that, can you remind me, is it
6 April of next year?

7 **MR. POMERANTZ:** It is, early April, April 3rd.

8 **MS. MOSKOWITZ:** April 3rd.

9 **THE COURT:** This would be like a July trial?

10 **MR. POMERANTZ:** Any of those dates would be fine.
11 What we want, though, Your Honor, is two other things. We want
12 the spacing of the events. We all worked together with
13 Your Honor to come up with that spacing. We need to keep the
14 general spacing.

15 **THE COURT:** That's fine.

16 **MR. POMERANTZ:** And then the other thing we would ask
17 for is no new fact discovery.

18 **THE COURT:** I agree. I agree. Okay, that's fine
19 with -- an end is coming, so okay.

20 **MS. MOSKOWITZ:** Your Honor, may I just be heard? I
21 think Epic Games is the one party that does not want an
22 extension at all including of the trial date, and we included
23 that position in the States' request. April 3rd is already
24 30 months from the initial case management conference, which is
25 well over what Your Honor --

1 **THE COURT:** What is another 90 days? I mean,
2 seriously? Is it really going to make or break Epic? I don't
3 think so.

4 **MS. MOSKOWITZ:** The injunctive relief that we are
5 seeking -- the trial has been bumped multiple times already and
6 April 3rd we have been operating on since February when
7 Your Honor set it, which was already four months after the
8 parties had requested. So we do think we are prejudiced by any
9 extension here. We are ready to go.

10 **THE COURT:** I thought Epic was a non-jury trial.
11 Aren't you a bench trial?

12 **MS. MOSKOWITZ:** We wanted to be. But we heard
13 Your Honor clearly; that you were going to do this once. So we
14 have been waiting. We waited for class cert even though that
15 is not an issue for us. We have been sort of sitting and
16 waiting and trying to be as part of this group's schedule, but
17 the States' issue and Match's issue sort of dragging us back
18 further is prejudicing Epic even further. We are ready. We
19 want to go.

20 **THE COURT:** Okay. Match?

21 **MR. REITER:** Thank you, Your Honor.

22 **THE COURT:** How about 45 days? Let's just split -- I
23 will be a mediator. We will just split the -- zero to 90, we
24 will pick 45. Can you live with that?

25 **MR. REITER:** Your Honor, I wish I could but three

1 months is really the minimum that we need right now. Just
2 looking at the deposition schedule, we've got, by my count, at
3 least a dozen depos that haven't been noticed by us that we
4 need to participate in and then 15 depositions most likely just
5 for the Match case. I mean, 45 days, there is very little time
6 to get all that done in addition to just, on our side, having
7 to review --

8 **THE COURT:** You could have filed earlier. I mean, it
9 is not like you didn't know this was happening. There is a
10 certain point where I can deal a little bit, but I can't just
11 act like you are the only person in the room. Do you
12 understand that?

13 **MR. REITER:** I understand that, Your Honor. We don't
14 want to be here asking for this. We have been doing everything
15 we can to avoid that result. We have experienced some
16 unexpected delays.

17 Just as an example, I didn't get Google's document
18 productions to the other Plaintiffs until last month. It took
19 six weeks just to get that data actually processed, sent to us
20 and uploaded on our end. This record is enormous. There is
21 over --

22 **THE COURT:** I mean, I understand that and I'm not -- I
23 don't want to hear about it, but you got a huge head start.
24 Now, you have got this enormous bolus of data that all the
25 parties have been working hard to harvest for you. I

1 understand you've got to review it and it takes time and you
2 have a special relationship to the client, but it seems like
3 you have plenty of room not to recreate the wheel.

4 **MR. REITER:** And we are not -- to be very clear, we
5 are not recreating the wheel at all. Our discovery requests
6 have been targeted to Match specific issues, so will our
7 depositions.

8 This is really about giving our experts enough time to get
9 up to speed on the existing record and then also, Your Honor,
10 counterclaims were filed against us less than a month ago.

11 So we have a motion to dismiss pending. That won't even
12 be heard until September 8th. And just briefly on that point,
13 I think with respect to Google's proposal, we are fine with
14 everything except the idea that there should be no new
15 discovery served.

16 I want to be very clear. We don't have any intent to be
17 serving a substantial amount of new discovery, but I do require
18 some -- I will need a little bit of optionality there just
19 because of the fact that counterclaims were filed very recently
20 and after we had actually served our written discovery.

21 **THE COURT:** So you want mainly counterclaim discovery?

22 **MR. REITER:** Yes, Your Honor.

23 **THE COURT:** Mr. Pomerantz, that doesn't seem too
24 unreasonable.

25 **MR. POMERANTZ:** But the counterclaim discovery is

1 clearly part of the original discovery the two parties
2 exchanged. It is all the same story.

3 So the original requests go to exactly the issues that we
4 are talking about, and we have been engaged with them for --
5 literally for months trying to figure out how to do targeted
6 discovery. Both sides recognize we can't do massive discovery
7 with Match's late entry, and they made a deliberate choice
8 here, Your Honor.

9 We now have documents that were produced that show that
10 they went to the States two-and-a-half years ago with exactly
11 these claims, and then they chose to sit on the sidelines for
12 two-and-a-half years while Mr. Glackin and Ms. Moskowitz and
13 others went ahead and gathered this huge record.

14 We need to bring an end to all of this document discovery
15 that we have had in this case, and that's what we have worked
16 with Match on. We both gave on the meet-and-confers to have
17 targeted discovery. We both gave on the meet-and-confers to
18 have a limited number of depositions. I think it is like six
19 or eight per side.

20 We all reached those agreements already with full
21 knowledge of the counterclaim. Those agreements were reached
22 with the counterclaim.

23 **MR. REITER:** That's -- Your Honor --

24 **MR. POMERANTZ:** Your Honor, I think that if you look
25 at the counterclaim and you compare it to the allegations in

1 the case, it is just the Match story. It is just the story of
2 what did Match do and what did --

3 **THE COURT:** Breach of contract? What is the --

4 **MR. POMERANTZ:** It is largely breach of contract. It
5 is also false promise because if Your Honor remembers, they got
6 an extension of time to integrate Google Play billing; and we
7 now believe they got an extension by saying they intended to
8 comply with the policy when, in fact, they never intended to
9 comply. But that's the basic story; that all of the documents
10 that we are exchanging go to. There is no new discovery they
11 need on the counterclaim.

12 **THE COURT:** Can you remind me, when was the discovery
13 cut-off?

14 **MR. POMERANTZ:** It is August 8th right now.

15 **THE COURT:** Oh, it is. You want a little bit more
16 time?

17 **MR. POMERANTZ:** We are okay with current schedule,
18 30 days, 90 days, as long as we get a single trial.

19 **THE COURT:** How about 45? Let's be Solomonic. Can
20 everybody -- States, I haven't heard from the States. That's
21 more than you wanted; right. You are getting two extra weeks.

22 **MR. GLACKIN:** It is more than we wanted, Your Honor.

23 **THE COURT:** Don't say anymore. I might take it back.

24 (Laughter)

25 **MR. POMERANTZ:** Your Honor, if I can just ask for one

1 thing?

2 **THE COURT:** Yes.

3 **MR. POMERANTZ:** Let us then work with everybody to --
4 how to figure out how to redo the deadlines for those 45 days.

5 **THE COURT:** Here is what I want you to do: Submit a
6 new thing -- now, I'm going to task Mr. Pomerantz and Match,
7 just be reasonable -- if, Match, and you, Google, have a couple
8 of things you can't get done by October 1st or whatever the
9 new -- it's okay. I don't need to hear -- a couple depos to
10 finish, you can do it. All right. I don't need to be
11 involved. Just, you need to do it three weeks after because of
12 travel or whatever, that's fine.

13 **MR. POMERANTZ:** We read your mind because we have all
14 been operating with that assumption.

15 **THE COURT:** Okay, that goes for everybody. All right.
16 You can round out anything. You don't need to come to me
17 unless somebody is upset about something, then I will take care
18 of it.

19 There will be a date. And if you-all want to do something
20 after the date, it's okay with me as long as it doesn't affect
21 me. So long as it doesn't delay anything on my end, that's
22 fine. If it starts eating into my time to get ready for big
23 things, then I will have a problem; but short of that, you-all
24 can do whatever you want.

25 So I guess we will do, what is it, June something, July

something for trial?

MR. POMERANTZ: I think 45 days would put it mid to late May.

MS. MOSKOWITZ: Your Honor, that is the issue because a mid-May trial, Your Honor had said you don't want holidays interrupting; so that's why if we start mid-May, that's the Memorial Day, we are going to --

THE COURT: That's a Monday. Nobody goes anywhere.

MS. MOSKOWITZ: Okay. So you are thinking Your Honor has availability then for mid-May because I just want to make sure that we don't get bumped more.

THE COURT: The good news about Article III is I can do anything that I want.

(Laughter)

THE COURT: So the answer is yes.

MS. MOSKOWITZ: Okay.

THE COURT: I will have availability when I need to have availability.

MR. POMERANTZ: Your Honor, one other thing in terms of schedule.

THE COURT: Yes.

MR. POMERANTZ: So earlier this week Match filed a motion to dismiss our counterclaim. I don't think Match was in the case when Your Honor told all of the rest of us you don't

1 want motions to dismiss. We actually didn't file one heeding
2 your guidance. Epic didn't file one heeding your guidance.

3 **THE COURT:** And with good reason. I mean, it's
4 just -- anyway, go ahead, so...

5 **MR. POMERANTZ:** We will obviously file the opposition
6 if we need to Your Honor.

7 **THE COURT:** Well, Match, I mean, look, it is a breach
8 of contract. What do you want me to do? I mean, they said you
9 breached the contract. I'm not going to resolve that on a
10 motion to dismiss. It is clearly a fact dispute.

11 **MR. REITER:** Well, Your Honor, I think you can take a
12 look at their allegations and they make admissions that made
13 very clear that they could have no breach of contract claim.

14 **THE COURT:** Okay, let me just jump in. When you start
15 saying the other side has conceded, you are just telling me
16 there is a fact dispute. I'm sure Mr. Pomerantz is going to
17 say they didn't make any, quote-unquote, admissions. At that
18 point you are well outside of Rule 8 and 12(b)6.

19 **MR. POMERANTZ:** Your Honor, it is the kind of motion
20 that says "dismiss this part of the breach of contract claim
21 but not that part of the breach of contract claim."

22 It just seems to us with how busy we all are, we shouldn't
23 be wasting our time on a motion to dismiss. We are all working
24 hard. We actually are all working together on this. I just
25 think the motion to dismiss is a distraction.

1 **THE COURT:** Before I round out that thought, what are
2 people thinking about summary judgment? Plaintiffs?

3 **MS. GIULIANELLI:** Well, I can speak to consumers. I
4 don't think there would be any basis to grant summary judgment
5 in this case at all.

6 **THE COURT:** All right. That's a good answer. States?
7 How about States?

8 **MR. GLACKIN:** It is very hard for me to imagine how
9 summary judgment would be appropriate in this case.

10 **THE COURT:** All right. I think that's all right.
11 Epic?

12 **MS. MOSKOWITZ:** Same. And cutting that out actually
13 allows us to find the time without actually moving the trial
14 schedule, by the way.

15 **THE COURT:** Okay. Good judo move. Match?

16 **MR. REITER:** Well, Your Honor, with respect to the
17 motion to dismiss, I do think this is a great opportunity to
18 narrow the scope of this case moving forward.

19 They filed five counterclaims, and I think I will ask you
20 just please read the motion. I think they are meritorious
21 arguments. If those are not granted, then I believe we would
22 be seeking summary judgment on those claims.

23 **THE COURT:** Defendant.

24 **MR. POMERANTZ:** Obviously we are seriously considering
25 filing a summary judgment motion, and we are still working on

1 what those arguments will be. We would hope, Your Honor, would
2 at least allow us to file one we will see what the merits are.

3 **THE COURT:** I'm not going to. I know some of my
4 colleagues are a little tight fisted about it. I'm not among
5 them. The odds are very high that I would just carry it
6 through trial anyway.

7 Look, you know as well as I do, perhaps even better,
8 Mr. Pomerantz, Section 2 is -- it's not impossible to get
9 summary judgment but it is not very common.

10 **MR. POMERANTZ:** We will keep that in mind, Your Honor.
11 We are not going to waste your time or our time on this. We
12 are seriously considering it, and we will obviously let the
13 Plaintiffs know if and when we make a decision about whether to
14 file one and if so, what the arguments will be.

15 **THE COURT:** Well, I would like to keep -- things have
16 been moving relatively well. I would like to keep everything
17 focused.

18 Don't file anything on the motion to dismiss. I will
19 review the opening brief. If I think there needs to be
20 something that I would benefit from, I will call for a
21 response. In the meantime, you are relieved from doing that.

22 And why don't you submit a joint proposed scheduling order
23 with the 45 -- this will be the last one; okay. This is it. I
24 can't -- you know, tax that any farther than I have so far
25 unless there is some seriously good reason.

1 So this is it. This is the last time. And while you are
2 all here, anything else?

3 **MR. POMERANTZ:** Your Honor, just to be clear, on that
4 new schedule, there will be no new fact discovery. Whatever is
5 on the table is on the table. I just want to be clear because
6 I think --

7 **THE COURT:** Yeah, subject to any, you know, side deals
8 that you want to work out that don't impact my end of the
9 schedule, that's all fine.

10 **MR. POMERANTZ:** The only other thing that is on the
11 table is the preliminary approval of the settlement with the
12 developer class.

13 **THE COURT:** That is coming up next.

14 **MR. POMERANTZ:** Thank you, Your Honor.

15 **MS. MOSKOWITZ:** Your Honor, just briefly, there were a
16 couple things on your plate to help us finish up discovery.
17 There is a dispute about an Activision deposition, for example,
18 that was a letter brief that was filed.

19 **THE COURT:** Okay.

20 **MS. MOSKOWITZ:** That's the main -- that's the main, I
21 think --

22 **THE COURT:** That's it, just Activision?

23 **MS. MOSKOWITZ:** Yes, there is a pending issue that I
24 think we are hopefully working out on a Steam -- on an Epic
25 discovery issue that Google had raised, but I think we are

1 close to resolving that, so I don't think Your Honor needs to
2 act on that unless Glenn Pomerantz disagrees.

3 But I think those are the main discovery issues that are
4 open in front of Your Honor and because it involves a third
5 party with Activision --

6 **THE COURT:** I don't think they are here.

7 **MS. MOSKOWITZ:** They are not. I don't need to argue
8 it. I just wanted to raise it to Your Honor to see if we can
9 get that cleared up so we can get that done in time.

10 **THE COURT:** I will try to get that done in the next
11 week or so.

12 **MR. POMERANTZ:** Your Honor, just so I can follow up,
13 Ms. Moskowitz is correct. We submitted a letter brief, a
14 discovery dispute, relating to Steam -- Steam Deck. We are
15 close to working that out with them, so I would ask you just to
16 hold off on that at least for a few more days and we will send
17 you a communication.

18 **THE COURT:** Perfect, okay. That's good.

19 Okay, let's take a five-minute break and then we will do
20 the developers.

21 **MS. MOSKOWITZ:** Thank you, Your Honor.

22 **THE CLERK:** All rise court is in recess.

23 (Recess taken at 11:22 a.m.)

24 (Proceedings adjourned at 11:22 a.m.)

25 ---oo---

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3 **CERTIFICATE OF REPORTER**

4 I certify that the foregoing is a correct transcript
5 from the record of proceedings in the above-entitled matter.
6

7 DATE: Friday, August 5, 2022
8
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10 
11

12 Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
13 United States District Court - Official Reporter
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